

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

**THAN ZAW, INDIVIDUALLY
AND ON BEHALF OF ALL
OTHERS SIMILARLY
SITUATED,**

Plaintiff,

v.

**NELNET BUSINESS
SOLUTIONS INC.; NELNET,
INC.; and NELNET
SERVICING, LLC; and DOES 1-
100,**

Defendant.

Case No.: C 13-05788 RS

CLASS ACTION

**ORDER CERTIFYING
PROVISIONAL SETTLEMENT
CLASS; PRELIMINARILY
APPROVING CLASS ACTION
SETTLEMENT AND PROVIDING
FOR NOTICE TO THE
SETTLEMENT CLASS, AS
MODIFIED BY THE COURT**

HON. RICHARD SEEBORG

On July 31, 2014, a hearing was held on the parties' joint motion for preliminary approval of a settlement class. At that time, the Court expressed concern with the scope of the release in the proposed settlement agreement, which provides in relevant part:

The Named Plaintiff and each Class Member . . . hereby jointly and severally release and discharge defendant Nelnet Servicing, LLC . . . from any and all actions, causes of action, obligations, costs, expenses, damages, losses, claims, liabilities, and demands, of whatever character, known or unknown, arising out of, relating to, or in connection with, the operative complaint in the Action, the putative Class Claims asserted in the Action, *the Released Parties' recording and/or monitoring of calls*, and the administration of this settlement ("Released Claims").

ORDER CERTIFYING PROVISIONAL SETTLEMENT CLASS; PRELIMINARILY APPROVING CLASS ACTION SETTLEMENT AND PROVIDING FOR NOTICE TO THE SETTLEMENT CLASS

1 (Settlement Agreement, pp. 8–9 (emphasis added).) Of particular concern was the
2 fact that, while the class definition is temporally limited to individuals who received
3 calls from defendant on or after December 18, 2011 through the date of preliminary
4 approval, the claims release is not so limited. Both parties represented to the court
5 that the release is not intended to encompass claims beyond the scope of the
6 complaint. Nevertheless, the italicized portion of the release could fairly be read to
7 encompass a release of any claims a class member might possess arising from
8 defendant’s recording or monitoring of calls either before or after the class period.
9 In other words, the plain language of the release is not limited to “the Released
10 Parties’ recording and/or monitoring of calls *during the class period*.” Although an
11 individual who only received calls from defendant before December 18, 2011 would
12 fall outside of the class definition, an individual who received calls during the class
13 period and also outside of the class period (and who does not opt out) would be
14 bound by this release even for claims arising from calls made before the class period
15 commenced.

16 Despite this reservation, the proposed settlement “falls within the range of
17 possible approval,” and meets other basic requirements for preliminary approval. *In*
18 *re Tableware Antitrust Litig.*, 484 F.Supp.2d 1078, 1079 (N.D. Cal. 2007). The
19 parties would be well-served, however, by considering an amendment to the scope
20 of the release and, in any event, should be prepared to address this concern again at
21 the final approval hearing. With that caution in mind, and good cause appearing, the
22 parties’ motion to certify a provisional class and for preliminary approval of the
23 class action settlement is granted for the reasons set forth below.

24
25 WHEREAS, a putative class action is pending in this Court entitled, *Than*
26 *Zaw, individually and on behalf of all others similarly situated v. Nelnet Business*
27 *Solutions Inc.; Nelnet, Inc.; and Nelnet Servicing, LLC; and DOES 1-100*, Case
28 No.: C 13-05788 RS (the “Action”);

1 WHEREAS, the Parties to the Action have agreed, subject to Court approval
2 following notice to the proposed settlement class (as described in Paragraph 7
3 below) and a hearing, to settle the Action upon the terms and conditions set forth in
4 the Settlement Agreement, the Parties now request a preliminary certification of a
5 Fed. R. Civ. P. 23(b)(3) settlement class and preliminary approval of the proposed
6 class action settlement;

7 WHEREAS, this Court has reviewed the Settlement Agreement, as well as
8 the files, records and proceedings to date in this matter;

9 WHEREAS, for purposes of this Order, capitalized terms used below have
10 the meaning ascribed to them in the Settlement Agreement, unless otherwise
11 defined; and

12 WHEREAS, for purposes of the Action, this Court has subject matter and
13 personal jurisdiction over the parties, including all Settlement Class Members.

14 NOW, THEREFORE, based on this Court's review of the Settlement
15 Agreement and all of the files, records, and proceedings herein, the Court
16 concludes, upon preliminary examination, that the Settlement Agreement and
17 settlement appear fair, reasonable, and adequate, and within the range of
18 reasonableness for preliminary settlement approval, and that a hearing should and
19 will be held after notice to the Settlement Class (as described in Paragraph 7
20 below) to confirm that the Settlement Agreement and settlement are fair,
21 reasonable and adequate and to determine whether the settlement should be
22 approved and final judgment entered in the Action based upon the Agreement.

23 The Court has read and considered the Agreement, Preliminary Approval
24 Motion and the record.

25 **NOW, THEREFORE IT IS HEREBY ORDERED:**

- 26 1. Jurisdiction. The Court has jurisdiction over the subject matter of the Action
27 and over all settling parties hereto.

2. Preliminary Approval of Proposed Settlement. The Agreement, including all exhibits thereto, is preliminarily approved as fair, reasonable and adequate and within the range of reasonableness for preliminary settlement approval.

The Court finds that:

(a) the Agreement resulted from extensive arm's length negotiations; and

(b) the Agreement is sufficient to warrant notice of the settlement to persons in the Settlement Class and a full hearing on the approval of the Settlement.

3. Class Certification For Settlement Purposes Only. Pursuant to Federal Rule of Civil Procedure 23(c), the Court conditionally certifies, for settlement purposes only, the following Settlement Class:

All persons within the State of California, who, on or after December 18, 2011 through the date of preliminary approval, received a telephone call from Defendant that was recorded and/or monitored by Defendant.

The total number of potential class members, based upon Defendant's records, is approximately 104,122.

In connection with this conditional certification, the Court makes the following preliminary findings:

- a. The Settlement Class appears to be so numerous that joinder of all members is impracticable;
- b. There appear to be questions of law or fact common to the Settlement Class for purposes of determining whether this settlement should be approved;
- c. Plaintiff's claims appear to be typical of the claims being resolved through the proposed settlement;

d. Plaintiff appears to be capable of fairly and adequately protecting the interests of the Settlement Class Members in connection with the proposed settlement;

e. For purposes of determining whether the settlement is fair, reasonable and adequate, common questions of law and fact appear to predominate over questions affecting only individual Settlement Class Members. Accordingly, the Settlement Class appears to be sufficiently cohesive to warrant settlement by representation; and

f. For purposes of settlement, certification of the Settlement Class appears to be superior to other available methods for the fair and efficient settlement of the claims of the Settlement Class Members.

4. Class Representative. Plaintiff Than Zaw is designated as class representative for the Settlement Class.

5. Class Counsel. The Court appoints Hyde & Swigart and the Kazerouni Law Group, APC as counsel for the Settlement Class. The Court finds that counsel is competent and capable of exercising all responsibilities as Class Counsel for the Settlement Class.

6. Settlement Hearing. A final approval hearing (the “Settlement Hearing”) shall be held before the Honorable Richard Seeborg, at the U.S. District Court, 250 Golden Gate Avenue, San Francisco, CA 94102, in Courtroom 3, on **November 13, 2014, at 1:30 p.m.**, as set forth in the notice to the Settlement Class, to determine whether the Agreement is fair, reasonable and adequate and should be approved. Papers in support of final approval of the Agreement, the incentive award to Plaintiff and Class Counsel’s application for an award of attorneys’ fees, costs and expenses (the “Fee Application”) shall be filed with the Court according to the schedule set forth in Paragraph 10 below. The Settlement Hearing may be postponed, adjourned, or continued by order of the Court without further notice to the Settlement

1 Class. After the Settlement Hearing, the Court may enter a settlement order
2 and final judgment in accordance with the Agreement that will adjudicate the
3 rights of the Settlement Class Members with respect to the Released Claims
4 being settled.

5 7. Class Notice. Class Notice shall be published within thirty (30) days
6 following entry of this Order.

7 (a) Direct Mailing & Electronic Mailing Notice. The Claims Administrator
8 will send Notice to the Class via (i) first class mail; and, (ii) electronic
9 mail thirty (30) days after entry of the Preliminary Approval Order. The
10 Claims Administrator shall obtain this contact information from the
11 Notice Database. In addition, the Claims Administrator (1) may check
12 the each mailing address against the United States Post Office National
13 Change of Address Database before the initial mailing; (2) may conduct a
14 reasonable search to locate updated addresses for any Class Member
15 whose Settlement Notice is returned as undeliverable; (3) shall update
16 addresses based on any forwarding information received from the United
17 States Post Office; and, (4) shall update addresses based on any requests
18 received from Class Notice.

19 (b) Internet Notice. The Settlement Administrator will establish and
20 maintain an Internet site using domain name
21 www.ZawCallRecordingSettlement.com dedicated to the Settlement, on
22 which will be posted the Short Form Notice, the Settlement Agreement
23 with Exhibits, any attorneys' fees and costs application and any Orders
24 relating to Preliminary Approval or Final Approval. The Publication
25 Notice shall direct recipients to the settlement website. The website shall
26 also allow for a Claim Form to be downloaded. The Settlement web page
27 will be established prior to the publication of Notice and shall remain
28 active until the date of Final Approval Order.

1 (c) Settlement Call Center. The Claims Administrator shall designate a toll-
2 free number for receiving calls related to the settlement (“Settlement Call
3 Center”). The Settlement Call Center shall be operation at a minimum
4 from 9:00 a.m. to 9:00 p.m. PST and shall be maintained from the date
5 Notice is sent through at least the next 60 days. After that time, and for a
6 period of ninety (90) days thereafter, either a live person or a recording
7 will advise the caller that the details regarding the settlement may be
8 reviewed on the related settlement website.

9 (d) CAFA Notice. In compliance with the Class Action Fairness Act of
10 2005, Pub. L. No. 109-2, 119 Stat. 4, and as set forth in the Agreement,
11 Defendant shall be ultimately responsible for serving written notice of the
12 proposed class action settlement on the person who has the primary
13 Federal regulatory or supervisory responsibility with respect to
14 Defendant.

15 (e) Declaration to be Filed Regarding Notice. At least ten (10) days prior to
16 the Final Approval Hearing, the Claims Administrator shall file a
17 declaration of compliance with the notice procedures as set forth in the
18 Agreement.

19 (f) Findings Concerning Class Notice. The Court finds that the foregoing
20 program of Class Notice and the manner of its dissemination is the best
21 practicable notice under the circumstances and is reasonably calculated to
22 apprise Settlement Class Members of the pendency of this Action and
23 their right to object to or exclude themselves from the Settlement Class.
24 The Court further finds that the Class Notice program is reasonable, that
25 it constitutes due, adequate and sufficient notice to all persons entitled to
26 receive notice and that it meets the requirements of due process and
27 Federal Rule of Civil Procedure 23.
28

1 (g) Approval Of Claims Process and Settlement Procedure. The claims
 2 submission processes described in the Settlement Agreement are hereby
 3 approved. The Court preliminarily approves the process set forth in the
 4 Settlement Agreement for submitting, reviewing, approving and paying
 5 all claims as described in the Settlement Agreement.

6 (h) Costs of Administration, Incentive Payments, and Attorney Fees. The
 7 Court also approves the process for paying the costs of notice and claims
 8 administration, the incentive payment and the Class Counsel's attorneys'
 9 fees and litigation costs. These costs will be paid out of the Settlement
 10 Fund, prior to any disbursement of the remaining amount on a pro rata
 11 basis to the Settlement Class Members who submit timely and valid
 12 claim forms.

13 8. Exclusion From The Settlement Class.

14 (a) Class Members have the right to opt out and exclude themselves from the
 15 settlement by mailing an exclusion request ("Exclusion Request") to the
 16 Claims Administrator. The Exclusion Request must be postmarked on or
 17 before the date specified in the Notice, which is 60 days from the date
 18 notice is provided. The Claims Administrator will provide copies of such
 19 exclusion requests to Class Counsel and counsel for Defendant. All
 20 Settlement Class Members who do not opt out in accordance with the
 21 terms set forth herein will be bound by all determinations and judgments
 22 in the Action.

23 (b) Exclusion requests must: (i) be signed; (ii) include the full name, address
 24 and phone number of the person(s) requesting exclusion; (iii) include a
 25 statement to the effect that they wish to be excluded from this Settlement;
 26 and (iv) include the name and case number of the Action. No request for
 27 exclusion will be valid unless all of the information described above is
 28 included. No Settlement Class Member, or any person acting on behalf of

or in concert or participation with that Settlement Class Member, may exclude any other Settlement Class Member from the Settlement Class.

(c) The Claims Administrator will retain a copy of all requests for exclusion.

Not later than ten days before the Final Approval Hearing, the Claims Administrator shall file with the Court a declaration that lists all of the opt-outs received.

(d) If 1,000 or more Class Members opt-out of the Settlement Agreement by timely submitting an Exclusion Request, then Defendant, in its sole discretion, shall have the right to terminate the settlement. In the event that the settlement is terminated, the Parties will be returned to the status quo ante as if no settlement had been negotiated or entered into as set forth in the Settlement Agreement.

9. Objections And Appearances.

(a) Any person in the Class who has not timely submitted a valid request for exclusion from the Class, and thus is a Class Member, may appear at the Final Approval Hearing to argue that the proposed Settlement should not be approved and/or to oppose the application of Class Counsel for an award of attorneys' fees and the incentive award to the Plaintiff.

(b) In order to be heard at the hearing, the person must make any objection in writing and file it with the Court within 60 days of the day notice is provided. The objection must also be mailed to the Claims Administrator, located at Zaw v. Nelnet c/o GCG P.O.Box 35122, Seattle, WA 98124-5122, and postmarked not later than 60 days from the day notice is provided.

(c) Any Objection filed with the Court and submitted to the Claims Administrator must set forth the name and case number of this matter, Class Member's name, address, telephone number and all arguments, citations and evidence supporting the Objection, and a statement of

whether the objecting Class Member intends to appear at the hearing for final approval of the class action settlement, and whether the objecting Class Member intends to appear at the hearing with or without counsel. The Claims Administrator will provide copies of such Objections to Class Counsel and Defendant' counsel. Any Class Member who fails to comply with these provisions shall waive and forfeit any and all rights the Class Member may have to appear separately and/or object, and shall be bound by all the terms of this Stipulation of Settlement and the Settlement, and by all proceedings, orders, and judgments in the Action. Any objections that are not timely filed and mailed shall be forever barred.

10. Further Papers In Support Of Settlement And Fee Application. Any responses to objections to the Agreement shall be filed with the Court on or before the date of the Final Approval Hearing. Any general briefing in support of final approval of the Settlement not specifically directed to objections shall be filed thirty (30) days before the Final Approval Hearing. Any application for attorneys' fees and costs shall be filed no later than thirty (30) days prior to the last date for objecting to the Settlement. Supplemental papers in support of such fees and costs application, including objections to such fees and costs, may be filed on or before the date of the Final Approval Hearing.

11. Effect of Failure to Approve the Agreement. In the event the Agreement is not approved by the Court, or for any reason the Parties fail to obtain a Final Judgment as contemplated in the Agreement, or the Agreement is terminated pursuant to its terms for any reason, then the following shall apply:

(a) All orders and findings entered in connection with the Agreement shall become null and void and have no further force and effect, shall not be

1 used or referred to for any purposes whatsoever, and shall not be
2 admissible or discoverable in any other proceeding;

3 (b) The conditional certification of the Settlement Class pursuant to this
4 Order shall be vacated automatically and void; no doctrine of waiver,
5 estoppel or preclusion shall be asserted in any litigated certification
6 proceedings in the Action; and the Agreement, its existence and any draft
7 thereof, and any discussion, negotiation, documentation, or other part or
8 aspect of the Parties' settlement discussions leading to the execution of
9 the Agreement shall have no effect and shall not be admissible evidence
10 for any purpose, including to establish any fact relevant to class
11 certification or any alleged liability of Bank of America for the matters
12 alleged in the Action or for any other purpose;

13 (c) Nothing contained in this Order is, or may be construed as, any admission
14 or concession by or against Defendant or Plaintiff on any point of fact or
15 law; and

16 (d) Neither the settlement terms nor any publicly disseminated information
17 regarding the settlement, including, without limitation, the class notices,
18 court filings, orders and public statements, may be used as evidence for
19 any purpose whatsoever. In addition, neither the fact of, nor any
20 documents relating to, Defendant's withdrawal from the settlement, any
21 failure of the Court to approve the settlement and/or any objections or
22 interventions may be used as evidence for any purpose whatsoever.

23 12. Stay/Bar Of Other Proceedings. All proceedings in this Action are stayed
24 until further order of the Court, except as may be necessary to implement
25 the terms of the settlement. Pending final determination of whether the
26 settlement should be approved, Plaintiff, all persons in the Settlement Class
27 and persons purporting to act on their behalf are enjoined from commencing
28 or prosecuting (either directly, representatively or in any other capacity)

1 against any of the Released Parties any action, arbitration or proceeding in
2 any court, arbitration forum or tribunal asserting any of the Released
3 Claims.

4 13. Continuing Jurisdiction. The Court retains continuing and exclusive
5 jurisdiction over the action to consider all further matters arising out of or
6 connected with the settlement, including the administration and
7 enforcement the Agreement.

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10 Dated: 8/4/14



HON. RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE

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